

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
TODD L. and ANDREA M. McLAUGHLIN	:	ORDER
	:	DTA NO. 816024
for Redetermination of a Deficiency or for Refund of	:	
New York State Personal Income Tax under Article 22	:	
of the Tax Law for the Year 1992.	:	

Petitioners, Todd L. and Andrea M. McLaughlin, 133 North 15th Street, Olean, New York 14760-2022, filed a petition for redetermination of a deficiency or for refund of New York State personal income tax under Article 22 of the Tax Law for the year 1992.

On August 29, 1997, the Division of Tax Appeals issued to petitioners a Notice of Intent to Dismiss Petition pursuant to 20 NYCRR 3000.9(a)(4). On September 16, 1997, the Division of Taxation, by Steven U. Teitelbaum, Esq. (Christina L. Seifert, Esq., of counsel), submitted documents in support of dismissal. Thereafter, petitioner Todd L. McLaughlin, appearing *pro se* submitted a letter in response. After due consideration of the documents submitted, Arthur S. Bray, Administrative Law Judge, issues the following order.

ISSUE

Whether petitioners timely filed their petition following the issuance of the conciliation order.

FINDINGS OF FACT

1. Petitioners, Todd L. and Andrea M. McLaughlin, filed a request for a conciliation conference with the Bureau of Conciliation and Mediation Services ("BCMS"). The request was in response to a determination by the Division of Taxation ("Division") that petitioners had additional income subject to New York State personal income tax.

2. BCMS scheduled a conciliation conference for April 3, 1997 in Buffalo, New York. Petitioner Todd L. McLaughlin appeared at the conference. In a Conciliation Order, dated May 9, 1997, BCMS denied petitioners' request and sustained the statutory notice.

3. On August 15, 1997, the Division of Tax Appeals received the petition in this matter. The envelope bearing the petition was sent by regular United States mail and was postmarked August 13, 1997. Petitioner Todd L. McLaughlin's signature on the petition was dated August 9, 1997.

4. On August 29, 1997, the Petition Intake, Review and Exception Unit of the Division of Tax Appeals issued a Notice of Intent to Dismiss Petition. The notice stated:

"You are hereby notified of our intent to dismiss the petition in the above-referenced matter.

"Pursuant to section 170.3-a(e) of the Tax Law, a petition must be filed within ninety days from the date a Conciliation Order is issued.

"The Conciliation Order was issued on May 9, 1997 but the petition was not filed until August 13, 1997 or ninety-six days later.

"Pursuant to section 3000.9(a)(4) of the Rules of Practice and Procedure of the Tax Appeals Tribunal, the parties shall have thirty days from the date of this Notice to submit written comments regarding the proposed dismissal."

5. In response to the foregoing notice, the Division mailed a letter, dated September 16, 1997, which included affidavits from Thomas J. English and James Baisley explaining the

mailing procedures for conciliation orders. The Division also included a copy of the certified mail record and the conciliation order which denied petitioners' request and sustained the statutory notice. The affidavit of Thomas English, Assistant Supervisor of Tax Conferences in the Bureau of Conciliation and Mediation Services of the Division, sets forth the Division's general procedure for preparing and mailing out conciliation orders, which culminates in the orders being sent by certified mail by the United States Postal Service ("USPS"). Mr. English's affidavit describes the preparation of conciliation orders and the preparation of a certified mail record, the record listing those taxpayers to whom conciliation orders are being sent by certified mail on a given day. A certified control number is assigned to each conciliation order listed on the certified mail record. Mr. English notes that the certified control number assigned to the copy of the Conciliation Order sent to petitioners was P482629582. According to Mr. English, each page of a certified mail record is a separate certified mail record for the conciliation orders listed on that page only, and each page contains spaces to record the "Total Number of Pieces Listed by Sender" and the "Total Number of Pieces Received at Post Office" for conciliation orders listed on that page only. There is also a space on each individual certified mail record for the receiving postal employee to sign.

6. Mr. English attests to the truth and accuracy of the copy of the two-page certified mail record attached to his affidavit, which contains a list of the conciliation orders allegedly issued by the Division on May 9, 1997, including, on page one, an order addressed to petitioners, Todd L. and Andrea M. McLaughlin, 133 North 15th Street, Olean, NY 14760-2022. The certified control numbers run consecutively throughout the two pages and Mr. English states that there were no deletions from the mail record.

7. Each of the two pages of the certified mail record submitted is date stamped May 9, 1997 by the Colonie Center branch of the U.S. Postal Service in Colonie, New York and each contains a postal employee's initials verifying receipt. At the bottom of page one, the page on which petitioner's certified number is listed, the number "14" has been filled in as the "Total Number of Pieces Listed by Sender," and the number "14" has also been filled in as the "Total Number of Pieces Received at Post Office," indicating no deletions from the record.

8. Attached to Mr. English's affidavit as Exhibit "B" is a copy of the Conciliation Order, CMS No. 155241, dated May 9, 1997, which denied petitioners' request and sustained the statutory notice.

9. The affidavit of James Baisley, the Chief Mail Processing Clerk in the Division's Mail Processing Center, attests to the regular procedures followed by the Mail Processing Center in the ordinary course of its business of delivering outgoing certified mail to branches of the U.S. Postal Service. Mr. Baisley states that after a notice is placed in the "outgoing certified mail" basket in the Mail Processing Center, a member of the staff weighs and seals each envelope and places postage and fee amounts on the letters. Thereafter, a mail processing clerk counts the envelopes and verifies the names and certified mail numbers against the information contained in the mail record. Once the envelopes are stamped, Mr. Baisley maintains that a member of the mail processing center staff delivers them to the Colonie Center branch of the USPS in Albany. The postal employee affixes a postmark and/or his or her signature to the certified mail record as an indication of receipt by the USPS. He explains that the certified mail record becomes the Division's record of receipt by the USPS for the items of certified mail. In this case, the postal employee wrote the total number of pieces, initialed the certified mail record, and affixed a postmark which indicates that this was the total number received at the post office. Mr. Baisley's

knowledge that the postal employee wrote the total number of pieces to indicate that 14 pieces were received at the post office is based on the fact that the Division's Mail Processing Center requested that postal employees either circle the number of pieces received or indicate the number of pieces received by writing that number on the mail record. In the Division's ordinary course of its business practice, the certified mail record is picked up at the post office the following day and delivered to the originating office by a Division staff member.

10. On the basis of the procedures enumerated and the information contained in Mr. English's affidavit, Mr. Baisley concluded that on May 9, 1997 an employee of the mail and processing center delivered a piece of certified mail addressed to Todd L. and Andrea M. McLaughlin, 133 North 15th Street, Olean, N.Y. 14760-2022, to the Colonie Center Branch of the United States Postal Service in Albany, New York in a sealed postpaid envelope for delivery by certified mail. In addition, based on his review of the documents, Mr. Baisley determined that a member of his staff obtained a copy of the certified mail record, with the postmark indicating the mail was delivered to and accepted by the Postal Service on May 9, 1977, for the records maintained by BCMS. He concluded that the regular procedures comprising the ordinary course of business for the staff of the Mail Processing Center were followed in the mailing of the items of certified mail at issue herein.

11. There are 14 entries on the first page of the certified mail record with certified numbers running consecutively from P482629579 to P482629592. Thirteen orders on the page were redacted to protect the privacy of the persons involved.

12. In response to the Notice of Intent to Dismiss Petition, petitioner Todd L. McLaughlin mailed a letter which stated that while the petition may have been received late, one must take

into account delays by the Postal Service. According to Mr. McLaughlin, while the Notice of Intent to Dismiss Petition letter was dated August 29, 1997, it was not received by him until September 5, 1997. Mr. McLaughlin surmises that, if his petition was received late, the delay was due to the Postal Service and that he should not be penalized for the Postal Service's delay.

CONCLUSIONS OF LAW

A. Tax Law § 2008 provides, in pertinent part, that:

"[a]ll proceedings in the division of tax appeals shall be commenced by the filing of a petition with the division of tax appeals protesting any written notice of the division of taxation which has advised the petitioner of a tax deficiency . . . or any other notice which gives a person the right to a hearing in the division of tax appeals under this chapter or other law."

B. As pertinent here, petitioners had the option of requesting a conciliation conference with the Bureau of Conciliation and Mediation Services, rather than filing a petition (20 NYCRR 4000.3[a]). Such a request must also be filed within the 90-day period for filing a petition and effectively suspends the running of the limitations period for the filing of a petition (20 NYCRR 4000.3[c]).

Here, petitioners requested a conciliation conference, the conference was held, and petitioners' notice was sustained by a Conciliation Order dated May 9, 1977. According to Tax Law § 170(3-a)(e), that order would be binding upon petitioners unless, within 90 days from the date of issuance of the order, they filed a petition with the Division of Tax Appeals challenging the notice.

C. If a taxpayer fails to file a timely petition protesting the statutory notice and the Conciliation Order, the Division of Tax Appeals is precluded from hearing the case, having no jurisdiction over the matter (*see, Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989).

D. Where the taxpayer files a petition, but the timeliness of the petition is at issue, the Division has the burden of proving proper mailing of the order in question (*see, T. J. Gulf, Inc. v. State Tax Commn.*, 124 AD2d 314, 508 NYS2d 97; *Matter of Katz*, Tax Appeals Tribunal, November 14, 1991; *Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991).

E. If the order is properly mailed by the Division, there is a presumption of receipt by the person to whom it was addressed (*see, Engel v. Lichterman*, 62 NY2d 943, 479 NYS2d 188). However, the petitioner then has the right to rebut this presumption (*cf., Matter of Ruggerite, Inc. v. State Tax Commn.*, 64 NY2d 688, 485 NYS2d 517, 518).

F. The mailing evidence required of the Division is two-fold: first, there must be proof of a standard procedure used by the Division for the issuance of orders by one with knowledge of the relevant procedures; and second, there must be proof that the standard procedure was followed in the particular instance in question (*see, Matter of Katz, supra; Matter of Novar TV & Air Conditioner Sales & Serv., supra*). Thus, even in a case such as this one, where petitioners do not contest the date of mailing of the order, when the timeliness of a petition is at issue, the Division must, nevertheless, come forward with sufficient proof of mailing.

G. The Division has introduced adequate proof of its standard mailing procedure of conciliation orders via the affidavits of two Division employees, Thomas J. English and James Baisley, involved in the conciliation order issuance process. The affidavits generally describe the various stages of the order generation and mailing process and, in addition, attest to the veracity of the copies of the conciliation order and certified mail record attached.

Second, the Division established that the general issuance procedure was followed on May 9, 1997 in the generation and mailing of the Conciliation Order in question. First, page one of

the two-page certified mail record submitted lists petitioners, Todd L. and Andrea M. McLaughlin, 133 North 15th Street, Olean, N.Y. 14760-2022. Second, there are 14 entries on the page (the 13 orders on the page not going to petitioners were redacted to protect the privacy of the persons involved), with certified numbers running consecutively from the first (P482629579) to the fourteenth (P482629592). At the bottom of this page, the number "14" has been filled in both as the "Total Number of Pieces Listed by Sender," and as the "Total Number of Pieces Received at Post Office". It appears that there were no deletions from the list and the English affidavit confirms this. In addition, the certified mail record submitted is date stamped May 9, 1997 by the Colonie Center branch of the U.S. Postal Service in Colonie, New York and is initialed by the postal employee in receipt of the conciliation orders and mail record. Finally, the certified mail record submitted lists certified number P48269582 as the one assigned to the Conciliation Order issued to Todd L. and Andrea M. McLaughlin and the English affidavit refers to the same certified numbers.

In short, the English and Baisley affidavits, consistent in all respects with the information listed on the face of the certified mail record and the Conciliation Order in question, provide direct documentary evidence confirming the May 9, 1997 date and fact of mailing of the subject order (*see, Matter of Novar TV & Air Conditioner Sales & Serv., supra*). Moreover, the presence of the Postal Service date stamp on page one of the certified mail record -- the page containing the information regarding the order issued to petitioner -- directly supports the conclusion that the mailing of said order occurred as claimed by the Division (*see, Matter of Katz, supra*).

H. Petitioners' petition was sent by United States mail to the Division of Tax Appeals on August 13, 1997 (received on August 15, 1997), and thus, was deemed filed on August 13, 1997 (*see, 20 NYCRR 3000.22[a][1]*), or 6 days beyond the 90-day statutory time limit for filing a

petition following the issuance of a conciliation order (Tax Law § 170[3-a][e]; 20 NYCRR 4000.5[c][4]). Petitioners argue that they should not be penalized for a delay by the United States Postal Service in delivering their petition. This argument is unavailing for two reasons. First, since the petition was sent by United States mail, the controlling date is the date of the postmark stamped on the envelope and not the date that the petition is received (20 NYCRR 3000.22[a][1]). Therefore, a delay in the delivery of the envelope is of no consequence. Second, petitioners dated the signature on their petition August 9, 1997. Since this date is after the 90-day period, it is clear that the petition was not timely mailed.

I. Accordingly, it is ordered that the petition of Todd L. and Andrea M. McLaughlin is dismissed.

DATED: Troy, New York
November 6, 1997

/s/ Arthur S. Bray
ADMINISTRATIVE LAW JUDGE